

NORTH AMERICAN AGREEMENT ON LABOR COOPERATION TRILATERAL SEMINAR: LABOR BOARDS OF NORTH AMERICA

**Monterrey, Nuevo Leon, Mexico
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The Role of the National Mediation Board in the Process of Obtaining the Right to Negotiate a Collective Bargaining Agreement.

I. The Role and Authority of the National Mediation Board (NMB) during the Voting and Certification Process.

Section 2, Ninth of the RLA (45 U.S.C. §152, Ninth) authorizes the NMB to investigate a representation dispute and to take a secret ballot of the employees or to utilize any other appropriate method of ascertaining the names of representatives of the employees involved. An investigation commences when a labor organization or individual files an Application to Investigate a Representation Dispute (Form NMB-1). During the investigation the NMB will address any question concerning representation in accordance with the RLA, the NMB Rules (29 C.F.R. §§1201-1209), the Board's Representation Manual and any other directives the NMB issues.

The NMB has a statutory right to have access to and to make copies of carrier books and records (Section 2, Ninth). The Investigator will advise the carrier of these statutory rights whenever the Investigator determines that carrier books and records are necessary to the investigation.

Parties are any labor organization(s) or individual(s) seeking to represent a carrier's employees and any incumbent representative of the carrier's employees. A carrier by rail is defined at 45 U.S.C. §151, First of the RLA. A carrier by air is described at § 181 of the RLA. Carriers are not parties under Section 2, Ninth, however, they are participants and are under a statutory obligation to provide information and documentation to the NMB in representation matters.

Upon receipt of a proper application, an identification number will be assigned and preliminary correspondence will be sent to the participants, designating an NMB Investigator assigned to the case. The Participants file a notice of appearance designating its representative(s). Submissions to the NMB except privileged documents shall be simultaneously served on all representatives by the same or substantially similar method as used for service on the NMB.

An "ex parte communication" is an oral communication to the NMB in which all participants are not present at the time it is made, or a written

communication to the NMB not served simultaneously on all participants. *Ex parte* communications must not be conducted with the Members of the NMB or their Confidential Assistants. In addition, *ex parte* communications are prohibited between the participants and NMB Counsel assigned to any appellate matter including: Motions for Reconsideration; Allegations of Election Interference; Craft or Class Determinations; and/or Jurisdictional Issues. *Ex parte* communications are permitted with the Investigator(s) assigned to the case when the Investigator is engaged in the fact finding phase of a case.

I. Types of Unions and Relevant Rights.

The RLA is the oldest extant labor relations statute in the United States. At the time of the 1934 amendments to the RLA, the craft or class structure was the product of a history of collective bargaining relationships that began more than six decades before. Many of the crafts and classes in existence in 1934 and that exist today evolved from the 19th century rail brotherhoods, organizations of particular or generally related railroad occupations. These organizations were shaped by the collective bargaining process. For example, union agreements established rules of apprenticeship and lines of advancement among various occupations and management recognized and dealt with certain groups as a craft or class. After 1934 these factors remained the foundation of the Board's craft or class determinations. The following are examples well recognized crafts or classes in the railroad industry: locomotive engineer; dispatchers; signalmen, maintenance of way employees; carmen; and clerical, office, station and store employees.

The commercial airline industry was relatively new when the coverage under the RLA was extended to air carriers in 1936. Therefore, while the NMB was able to pattern rail crafts and classes after historical industry wide groupings of employees, no similar uniform patterns were available for airlines. The NMB made its first reported determination of an airline craft or class in 1943. *Transcontinental & W. Air*, 1 NMB 367 (1943). In 1945 the NMB conducted its first industry wide hearing into the appropriate groupings of airline employees. The Board conducted similar, subsequent, hearings on a variety of craft or class issues. The NMB's first efforts to establish airline crafts centered on what had worked for a different transportation industry, railroads.

In making craft or class determination in both industries it is a long standing Board policy not to fragment traditional employee groupings into smaller sub groups. Some carriers have cross trained and cross utilized employees in various job categories, extending across traditional craft or class lines. To address this issue the NMB applies a preponderance of work test. Examples of airline crafts or classes are pilots, flight deck crewmembers, flight attendants, mechanics and related employees, fleet and passenger service employees, dispatchers, and meteorologists.

Employees at the level of "subordinate official" and below are covered under the RLA. Management officials are excluded from coverage, however, the level of supervisory authority held by management officials is generally greater than that exhibited by "supervisors" under the NLRA. The RLA covers approximately 900,000 employees approximately 300,000 in the rail industry and 600,000 in the air industry. Approximately 65 to 70 percent of the airline employees are covered by the RLA and 80 to 85 percent of those in the railroad industry are unionized. The NMB's jurisdiction also extends to hundreds of smaller certificated air carriers, commuters, and air taxis, including ambulance, sightseeing, commercial helicopter and certain airport, air freight and related services and their employees.

The RLA empowers the NMB to investigate and issue orders with respect o disputes of over union representation. NMB orders must be enforced by court order. NMB actions are not subject to appeal and are subject to very narrow judicial review. Rights under the RLA which are not subject to the representation dispute procedures or adjustment board are enforced directly by court action.

I. Voting Procedures– Selection of Voting Location, Rights of Observers, and the Role of Employers.

In a group of cases known collectively as the *Switchmen's Trilogy*, the United States Supreme Court established that the NMB has exclusive jurisdiction over disputes regarding the selection and identity of employee representatives pursuant to Section 2, Ninth of the RLA (45 U.S.C. §152, Ninth). The NMB has broad discretion in its conduct of representation investigations. The Supreme Court in *Railway & Steamship Clerks v. Assoc. for the Benefit of No-Contract Employees*, 380 U.S. 650, 662 (1965) stated that "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case."

Until late 2002, the NMB conducted the majority of its elections by mail ballot. On rare occasions the NMB conducts ballot box elections. The recent anthrax scare had a significant effect on mail delivery to government offices and on mail delivery in general, and forced the NMB to examine alternatives to the mail ballot system. The NMB issued a decision on September 25, 2002, to generally conduct representation elections using Telephone Electronic Voting (TEV) effective September 30, 2002. The Board believes TEV will further its mission and enable the Board to conduct representation elections fairly and efficiently. TEV uses the same highly secure technology many Carriers use for shareholder voting and Organizations use for membership voting and polling.

Generally speaking the tally of election results (for Telephone Electronic Voting (TEV) Elections) or ballot count (for mail ballot elections)

takes place in Washington D.C. at the Board's offices. The NMB may allow a reasonable number of representatives from the organization(s) and the Carrier to observe the tally or ballot count.

Individuals whose eligibility or ineligibility has been challenged, will be sent a ballot or in the case of TEV, Instructions and a VIN. Prior to the count, the eligibility determinations will be made by the NMB election official and appropriate adjustments will be made to the election records. At the count or tally, the election official will clear all challenges, remove the names of those individuals whose Instructions or ballot were returned by the post office as undeliverable and adjust the list for changes in employee status (e.g. resignations, promotions out of craft or class, retirement). Where the voters' intent to vote for representation is clear, the vote is valid and will be counted. Valid votes include "write-in" or spoken votes which clearly indicate the voter's desire for representation. Where the voter's intent is not clear, the election official will consider the vote void.

The Investigator shall complete the count, tabulate the results, and record them on the Report of Election Results. The Investigator shall sign the Report of Election Results and provide copies to the participants. Under standard NMB balloting procedures a majority of all eligible employees must cast valid ballots in the election in order for a representative to be certified. If less than a majority cast valid votes for representation the NMB will dismiss the representation application.

When a majority of the eligible voters have cast valid ballots, but no single organization or individual has received a majority of the votes cast, a run-off election may be held. All requests for run-off elections should be directed to the attention of the Chief of Staff. Run-off elections will be conducted only with written authorization of the Board. The procedures for run-off elections are set forth in the NMB Rules §1206.1 (29 C.F.R. §1206.1).

If the applicant desires to be voluntarily recognized by the carrier rather than to have its application processed further, then the applicant should furnish a statement withdrawing its application. This withdrawal will be the basis for the NMB's closing of its case file.

If the employees involved in the craft or class are unrepresented and only the applicant organization is involved, certification on the basis of a check of authorizations may be appropriate provided the participants agree in writing.

The Investigator will inform the participants in writing that they may raise challenges or objections during the investigation. Challenges involve issues concerning employee eligibility but do not include employment status changes. Objections involve all other issues or questions. The Investigator will issue a written ruling on the challenges and objections. The ruling will set forth the participants' appeal rights and the appeal deadline. All appeals

must be filed with the Chief of Staff and be supported by substantial evidence. If the Investigator's ruling is not appealed to the NMB by the deadline, the Investigator's ruling is final. Absent extraordinary circumstances, evidence submitted on appeal will not be considered by the NMB unless it was submitted to the Investigator. The Board will issue a determination on appeals of Investigator rulings.

Any motions for Reconsideration of Board determinations must be received by the Chief of Staff within two (2) business days of the decision's date of issuance. An original and one (1) copy of the motion must be filed with the Chief of Staff. The motion must comply with the NMB's simultaneous service requirements of Manual Section 1.201. The motion must state the points of law or fact which the participant believes the NMB has overlooked or misapplied and the grounds for the relief sought. Absent a demonstration of material error of law or fact or circumstances in which the NMB's exercise of discretion to modify the decision is important to the public interest, the NMB will not grant the relief sought. The mere reassertion of factual and legal arguments previously presented to the NMB is insufficient to obtain relief. Reconsideration may not be sought from the NMB's certification or dismissal.

Existing certifications remain in effect until the NMB issues a new certification or dismissal.

I. **Mechanisms for Challenging the Outcome of an Election.**

The NMB will investigate allegations of election interference only after the ballot count, except in extraordinary circumstances. The NMB will consider only written allegations of election interference. Allegations must be submitted to the Chief of Staff no later than 4 p.m., eastern time, seven (7) business days after the date of the count. Participants may respond to such allegations by 4 p.m., eastern time, seven (7) business days after the Chief of Staff's receipt of the interference allegations. All submissions must comply with the simultaneous service requirements in Manual Section 1.201. Allegations of election interference must state a prima facie case that the laboratory conditions were tainted and must be supported by substantive evidence. Allegations of election interference not sufficiently supported by substantive evidence will be dismissed. If the NMB finds a prima facie case of election interference, the Chief of Staff will notify the participants in writing and continue its investigation into the allegations of interference.

Court challenges to NMB decisions may be brought by losing unions and employees. A carrier may also challenge an NMB determination even though it is not considered a party to NMB representation proceedings. As stated previously the Supreme Court has held that NMB representation decisions generally are not subject to judicial review. In addition, a judicial challenge to NMB procedures raised prior to the completion of the investigation will be considered premature if there is no actual injury. For instance the NMB's decision to conduct an investigation generally does not

give rise to any claim until the investigation is complete. *United States v. Feaster*, 410 F 2d 1354, *cert denied*, 396 U.S. 962 (1969).